UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JON ADAMS, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Civil No. 95-384-P-DMC***
	)	
C.N. BROWN COMPANY, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]

This employment discrimination action arises out of alleged sexual harassment and retaliation. Both plaintiffs assert claims against C.N. Brown Company, their former employer, and Don LeClair, a C.N. Brown employee, for sexual harassment in violation of 42 U.S.C. § 2000e-2(a)(1) (Title VII of the Civil Rights Act of 1964) and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4551 *et seq.*, and for retaliation in violation of 42 U.S.C. § 2000e-3(a) and 5 M.R.S.A. § 4572(1)(E) of the MHRA. Plaintiff Adams also asserts a claim against the defendants for retaliation in violation of the Maine Whistleblowers' Protection Act, 26 M.R.S.A. § 831 *et seq.* The plaintiffs also assert a claim against LeClair for interference with contractual relations.[2] For the

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

[2] The plaintiffs filed their Second Amended Complaint on June 26, 1996. Second Amended Complaint (Docket No. 21). The Second Amended Complaint added the interference-with-contractual-relations claim against LeClair, and "delete[d] the intentional infliction of emotional distress claim, the breach of employment contract claim and the Portland City Code claim."

reasons set forth below, I grant the defendants' motion in part and deny it in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc.*

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Their Motion to File Second Amended Complaint and Join Party Defendant ("Plaintiffs' Opposition") (Docket No. 12) at 33, 36. Accordingly, to the extent that the defendants' motion addresses deleted claims, it is moot. Additionally, I note that the defendants' summary judgment motion, filed before the Second Amended Complaint was filed, does not address the interference-with-contractual-relations claim against LeClair.

v. Town of Dedham, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

II. Factual Context

Viewed in the light most favorable to the plaintiffs, the summary judgment record reveals the following material facts: Defendant LeClair first met plaintiff Adams when Adams applied for a job at Lake Region Convenience Center, where LeClair was the manager. Deposition of Don LeClair ("LeClair Dep.") at 15, 17. LeClair hired Adams as a cashier, and Adams performed his job "very well." *Id.* at 17-18. LeClair left Lake Region around October 1993. *Id.* at 19.

About a month later, LeClair was hired as manager of a C.N. Brown "Big Apple" location in Windham. *Id.* In June 1993 he was transferred to a new C.N. Brown location, the North Windham Mobil Mart. *Id.* at 20. On August 10, 1993 LeClair hired Adams to be a manager-trainee at the Mobil Mart, based on his exceptional performance at Lake Region. *Id.* at 21-22; Affidavit of Jon Adams ("Adams Aff.") (Docket No. 13) ¶ 1(A). From then until November 20, 1993 LeClair was Adams's trainer. Adams Aff. ¶ 1(A). In December 1993 LeClair was promoted to C.N. Brown's marketing manager covering the Lewiston-Auburn area. LeClair Dep. at 22.[3] From November 20, 1993 until April 2, 1994 Adams was manager of C.N. Brown's South Portland store and had little contact with LeClair. Adams Aff. ¶ 1(B).

In March 1994 LeClair telephoned Adams and asked him to transfer to the Turner store to become manager of that store. *Id.* ¶ 1(D). The Turner store was one of C.N. Brown's largest stores

[3] LeClair still holds the position of marketing manager for the Lewiston-Auburn area. LeClair Dep. at 22.

with a significantly higher sales volume than the South Portland store. *Id.* LeClair told Adams that the store was "a wreck" because of cash and inventory problems, and that Adams would be "the right person to turn it around and bring it some order." *Id.* LeClair also said that, since the store was much larger, Adams would receive "much higher commissions and a house beside the store which [he] could rent at a low rate of $300.00 per month." *Id.* Adams was transferred to Turner on April 4, 1994, and he moved into the house on May 1, 1994. *Id.* ¶ 1(F).

Following Adams's transfer LeClair regularly came to the Turner store two to three times per week, and stayed from fifteen or twenty minutes to half a day each time. *Id.* ¶ 1(G). In early May 1994 LeClair came into the Turner store while Adams was in the office. *Id.* ¶ 1(H). LeClair asked Adams how he was doing and told him that he "looked good." *Id.* He said that especially Adams's chest looked good and that he would like to touch it. *Id.* Adams told LeClair that he could not touch his chest and that he did not appreciate the comment. *Id.*

During the same conversation LeClair asked Adams how he liked the store and the house next door, and Adams said he liked it. *Id.* ¶ 1(I). LeClair then asked if Adams thought he owed LeClair any sexual favors for getting him these things, and said that he would like to possibly perform oral sex on Adams. *Id.*; Deposition of Jonathan Adams ("Adams Dep.") at 39, 43-44. Adams replied that LeClair could not perform oral sex on him, and he told LeClair that he did not appreciate the suggestion and that he thought he had gotten to the Turner store for being a good manager and a hard worker. Adams Dep. at 39, 44.

> As a result of these comments, [Adams] became extremely upset and emotionally distressed. [He] felt that performing sexual favors was the payment LeClair expected for [his] promotion to become manager of the Turner store, and that if [he] did not perform the sexual favors with Don LeClair as Don requested, [Adams] would be in immediate danger of losing [his] position as the store manager, and any employment

at C.N. Brown.

> After LeClair's proposition to [Adams], every day [Adams] was deeply afraid that the only reason LeClair asked [him] to come to the Turner store was to have sex with [him], and if [he] did not perform [he] would lose [his] job.

Adams Aff. ¶ 1(J), (K).

In mid-May 1994, while LeClair and Adams were alone in the store cooler, LeClair approached Adams, told him he looked good, and asked him to bare his chest. *Id.* ¶ 1(L). Adams told LeClair he did not appreciate the comment and left the cooler as soon as he could. *Id.* That same day Adams followed LeClair to put up a display. *Id.* ¶ 1(M). Shortly before they reached the display LeClair stopped, casually turned and threw his hand into Adams's genital area, touching it with the back of his hand. *Id.* LeClair said it was an accident, but Adams did not believe that because he felt LeClair's hand on his genital area for a moment. *Id.* In late May 1994, while Adams was following LeClair, LeClair again casually brought his hand into Adams's genital area. *Id.* ¶ 1(N). LeClair said it was an accident, but Adams became very upset and told LeClair he did not believe it was an accident and that he did not appreciate it. *Id.*

In early June, while LeClair and Adams were getting billboard posters from LeClair's car, LeClair asked Adams what he was doing that weekend. *Id.* ¶ 1(O). Adams replied that he was not doing much, and LeClair asked if he could spend the weekend with Adams and go to bed with him during the weekend. *Id.* Adams became extremely upset emotionally, and told LeClair that "it wasn't going to happen, that [he] didn't appreciate it, that [he] would not accept it and that [he] didn't want to hear it again." *Id.*

On an almost daily basis from May 1 to June 6, 1994, LeClair made references to Adams's physical appearance, telling him that he "looked good." *Id.* ¶ 1(P). In light of the aforementioned

remarks, Adams interpreted these to be sexual remarks and advances. *Id.*

While the plaintiffs worked at C.N. Brown, the company had a written harassment policy outlining the grievance procedure for company employees. Affidavit of Roger Eberly ("Eberly Aff.") ¶ 2, Exh. E to Defendants' Statement of Material Facts Not in Dispute ("Defendants' SMF") (Docket No. 9); C.N. Brown Company Sexual Harassment Policy ("Policy"), Exh. 1 to Leclair Dep. The policy provided that an employee who believed he or she had been the subject of sexual harassment should immediately report the incident to his or her immediate supervisor or divisional supervisor. Policy ¶ 4. The policy explained that the company would investigate all complaints, and that all information provided by the employee would be held in confidence and discussed only with those who needed to know the information in order to either investigate or resolve the charge. *Id.* Finally, the policy provided that the company and its employees were not allowed to discipline an employee or change his or her work assignments because of the employee's complaints about or resistance to sexual harassment, discrimination or retaliation. *Id.* ¶ 6.

On June 6, 1994 Adams told Michael Doucette[4] that he had a problem and would like to speak with him in private. Doucette Dep. at 17-18. Adams sounded "a little distraught, a little upset." *Id.* at 17. That same day Adams met with Doucette and Mark Cyr, C.N. Brown's buyer merchandiser, in Doucette's office. *Id.* at 18-19. During this meeting, Adams accused LeClair of sexual harassment and alleged that LeClair had "touched him, propositioned him and asked him to bare his chest." *Id.* at 21. Adams told Doucette that he wanted to believe that his transfer from Portland to Turner was based on his job performance and not influence from LeClair, and that he was

[4] Doucette was at the time and currently is in charge of all retail operations within C.N. Brown. Deposition of Michael William Doucette ("Doucette Dep.") at 4.

"concerned that other people would think that he was gay." *Id.* Adams broke down and cried several times before and during the meeting. *Id.* at 20-21. Doucette offered Adams one week of paid administrative leave, and said that he would keep Adams and LeClair apart until an investigation was performed and a conclusion was reached. *Id.* at 22. LeClair was not put on administrative leave. *Id.*

On that same day, Doucette spoke with Roger Eberly, C.N. Brown's safety manager, Eberly Aff. ¶ 1, about how to set up the investigation, and they decided "to set something up to get the statements and stories of both parties," Doucette Dep. at 23. Later that day, Eberly met with Adams at Adams's house and discussed the allegations. Adams Dep. at 72-74. Also on June 6, Eberly and Doucette confronted LeClair with Adams's charge of sexual harassment and instructed LeClair not to have any contact with Adams until an investigation was conducted. Doucette Dep. at 24-25. LeClair denied any sexual wrongdoings. *Id.* The next day, Eberly called to tell Adams that Eberly would no longer be handling the investigation, and that, instead, Adams would be talking with Gail Wright, a social worker. Adams Dep. at 75. Eberly asked if Adams would feel comfortable doing that, and Adams responded that he felt comfortable doing whatever he needed to in order to take care of the situation. *Id.*

On or about June 9, 1994 C.N. Brown contacted Gail Wright, a licensed clinical social worker, to investigate Adams's allegation of harassment. Affidavit of Gail A. Wright ("Wright Aff.") ¶¶ 1, 4, Exh. A to Defendants' Reply to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment ("Defendants' Reply") (Docket No. 16). Wright's only prior connection with C.N. Brown was that she had been retained through a third party to see a C.N. Brown employee regarding a workers' compensation issue that was unrelated to sexual harassment. *Id.* ¶ 4. Prior to

the investigation Wright was given no detailed information regarding the nature of the charges, except that Adams was complaining of sexual harassment by a male supervisor. *Id.* ¶ 6. Wright personally interviewed Adams and LeClair on June 13, 1994. *Id.* ¶ 7.

After completing her interviews Wright had three telephone conversations with Eberly and Doucette on June 14, 15 and 16, 1994, wherein she explained her observations and findings, and in general the basis for her findings. *Id.* ¶ 8. She advised the company that they "would not be well advised to allow" Adams and LeClair "to continue working together in the future." *Id.* In her written report dated June 19, 1994, Wright summarized her findings as follows:

> Although no definitive judgment can be made as to the veracity of the allegations of sexual harassment based on these interviews, certain behaviors can be predicted from the level of functioning of these gentlemen. It would be expected that Mr. LeClair would attempt to help others, to protect those he perceived as being less fortunate, and to inconvenience himself in the process. From what was observed in the interview, it would be uncharacteristic of Mr. LeClair to joke publicly about sexual matters or orientation, or to openly solicit sexual favors. Mr. Adams would be more likely to distort facts and misinterpret social cues because of his preoccupation with attention seeking behaviors.

Report of Interviews Conducted in the Investigation of Alleged Sexual Harassment ("Report") at 8, Exh. B to Wright Aff. Wright recommended that LeClair should no longer be responsible for supervising Adams, that LeClair would benefit from remedial instructions on hiring and supervisory policies and procedures, that Adams should be assigned a new supervisor who could instruct him in the company's store management procedures, and that both individuals would benefit from additional training regarding sexual harassment. *Id.* at 8-9.

Upon his return to work on June 14, 1994 Adams told his supervisors that it was difficult for him to continue working because he had difficulty coping with the harassment on his mind. Adams Aff. ¶ 2(M). Doucette gave him the option of taking personal leave without pay or being demoted

to a cash register clerk at another store. *Id.* Adams continued in his position at the Turner store until transferred to the company's Gray store on June 17, 1994, and told Doucette that he thought his treatment was not fair. *Id.*

Sometime prior to June 17, a decision was made to transfer Adams to the Gray store because Doucette could find no indication of sexual harassment, based on Wright's report. Doucette Dep. at 32-33; Adams Aff. ¶ 2(D).[5] Adams's commissions in Gray were approximately $40 per month, in contrast with $450 to $500 per month in Turner, and Adams had much less responsibility in Gray than in Turner. Adams Aff. ¶ 2(D).

Adams's direct supervisor at the Gray location was Craig Frazier, C.N. Brown's Retail Marketing Manager for that location. Affidavit of Craig Frazier ("Frazier Aff.") ¶ 1-2, Exh. F to Defendants' SMF. Frazier advised Adams when he was first transferred to Gray that he would be required to work from 8:00 a.m. to 4:00 p.m. Monday through Friday, and a half-day on Saturday. *Id.* ¶ 4. At approximately 3:00 p.m. on July 13, 1994 Frazier called the store to provide Adams with a price change, and determined that Adams had already left for the day. *Id.* ¶ 5.[6] At approximately 2:00 p.m. on July 20, 1994 Frazier called the Gray location to give Adams a price change for the following day and determined that he had already left for the day. *Id.* ¶ 6. At that time he wrote up a notice of disciplinary action for Adams's personnel file. *Id.* The following day Frazier drove to the Gray location to determine whether the price changes had been made and to discuss Adams's

[5] The location in Gray is also referred to in the summary judgment record as the "mile 56" location. *See, e.g.*, Doucette Dep. at 32.

[6] Frazier also stopped by on July 14 to determine whether the price changes had been made, and determined that Adams was not there. Frazier Aff. ¶ 5. However, Frazier's affidavit does not state whether he stopped by during Adams's regular hours. *Id.*

disciplinary notice in person. *Id.* Adams refused to sign the disciplinary notice "because [he] had understood from [his] supervisor when [he] was transferred that [he] could leave at 2:00 p.m. under certain circumstances." Adams Aff. ¶ 2(O).

On or about July 17, 1994 Frazier terminated Adams for insubordination and failure to work the hours expected of him and deemed necessary to complete his job in a satisfactory manner. Frazier Aff. ¶ 3. At that time Frazier had no knowledge as to why Adams had been transferred from the Turner store or of his prior complaints of sexual harassment at the Turner store. *Id.* ¶ 7. Prior to Adams's termination Frazier's only conversations with Doucette concerning Adams were to the effect that Adams "was being assigned there, and to treat him as a new employee -- as a new manager." Doucette Dep. at 39.

Joseph Henry was hired as a cashier at C.N. Brown on February 23, 1994. Affidavit of Joseph Henry ("Henry Aff.") (Docket No. 14) ¶ 1. Shortly after he was hired, as he was helping his manager, Ed Bergeron-Kelley, and his managing supervisor, LeClair, put up a poster, LeClair told Henry in Bergeron-Kelly's presence "that [Henry] had a nice ass and 'the things I could do with that ass.'" *Id.* Henry was extremely upset by the comment and told LeClair he did not appreciate the comment. *Id.* Shortly afterwards he complained to Bergeron-Kelley in very strong terms about the comments. *Id.* Bergeron-Kelley told LeClair that the comments were "good grounds for sexual harassment." Deposition of Edward Bergeron-Kelley ("Bergeron-Kelley Dep.") at 10.

On or about April 4, 1994 Henry was voluntarily transferred from C.N. Brown's Auburn store to the Turner store. Henry Aff. ¶ 2. Prior to the transfer, Bergeron-Kelley had told Henry that he was being transferred to Turner to be promoted from cashier to the manager-trainee program, and that LeClair wanted to put him in that position. *Id.* In mid-April 1994 Henry asked LeClair when

he was going to begin the manager-trainee program, and LeClair replied that "if you scratch my back, I'll scratch yours." *Id.* ¶ 3. When Henry asked what LeClair meant by that, LeClair stated that if Henry slept with LeClair, Henry would get the position. *Id.* Henry became very upset and walked out. *Id.* Following this incident, Henry was convinced that if he did not perform sex with LeClair he would not get in the manager-trainee program. *Id.* ¶ 5.

On or about May 11, 1994 LeClair told Adams to write up Henry for a high lottery adjustment and a cash shortage on his report. Adams Dep. at 64; Exh. 4 to LeClair Dep. at 3-4 (two Notices of Disciplinary Action dated May 11, 1994). Adams told LeClair that, according to Adams's daily report, there was no shortage for the day, and that he did not feel that Henry should be written up. Adams Dep. at 64-65. Nonetheless, LeClair told Adams that "for the sloppiness of the paperwork [he] want[ed] [Henry] to be written up on two accounts." *Id.* at 64-65.

Sometime in early June 1994, while Adams was on administrative leave, Henry called Adams, then his manager at the Turner store, and told him that LeClair had sexually harassed him. Henry Aff. ¶ 4; Adams Aff. ¶ 2(K). Adams recommended that Henry file a complaint with the Maine Human Rights Commission. Henry Aff. ¶ 4.

On June 7, 1994 Bergeron-Kelley went to the Turner store while Adams was on administrative leave, and Henry told Bergeron-Kelley that he was upset about not getting into the manager-trainee program. Bergeron-Kelley Dep. at 12-13. Bergeron-Kelley told LeClair that Henry was upset about not getting into the program, whereupon LeClair told Bergeron-Kelley to "get rid of him." *Id.* at 13. Bergeron-Kelly then prepared a notice of disciplinary action which stated that Henry had cash shortages in the past and had two written warnings in the past four weeks, and that he had an "I don't care attitude." *Id.* at 14-15. In fact, as Bergeron-Kelly has acknowledged, Henry

did not have an "I don't care attitude," and the third cash shortage noted in the notice of disciplinary action was merely a paperwork error on Henry's part, rather than an actual cash shortage. *Id.* at 15-16. Upon LeClair's instruction, Bergeron-Kelley wrote on the notice, "[Henry] is not to be rehired unless cleared by . . . Don LeClair." *Id.* at 16.

On June 7, 1994 Henry went to Adams's home to complain that he was written up and discharged wrongfully, as a result of LeClair's sexual harassment. Henry Aff. ¶ 9. Adams said he would look into it when he returned to the office from administrative leave. *Id.* On June 14, 1994 Adams went through the store records and determined that Henry had no cash shortages; he so advised the acting marketing supervisor, who said that Henry's termination was final. Adams Aff. ¶ 2(L).

III. Legal Analysis

A. Statutory Claims Against Defendant LeClair

"[T]he agents of employers, including supervisory employees, are not subject to personal liability under the federal employment discrimination statutes." *Quirion v. L.N. Violette Co.*, 897 F. Supp. 18, 20 (D. Me. 1995). "[G]iven the well accepted practice of construing the MHRA in a manner consistent with the prevailing federal caselaw, . . . the MHRA does not impose individual liability." *Caldwell v. Federal Express Corp.*, 908 F. Supp. 29, 36 (D. Me. 1995). Accordingly, LeClair is entitled to summary judgment on the plaintiffs' Title VII and MHRA claims.[7]

B. Title VII Claims

1. Applicability of Title VII to Same-Sex Harassment

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1).[8] C.N. Brown argues that a male supervisor's

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[7] The Maine Whistleblowers' Protection Act, however, includes "an agent of an employer" within its definition of employer, 26 M.R.S.A. § 832(2), so LeClair is not entitled to summary judgment on Adams's claim under that act merely because he is an individual employee of the defendant company.

[8] The MHRA provides that it is unlawful "[f]or any employer to . . . discharge an employee or discriminate with respect to . . . promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment" based on the employee's sex, or to "discriminate in any manner against individuals because they have opposed a practice that would be in violation of [the MHRA] or because they have made a charge, testified

harassment of a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. The United States Courts of Appeals for the Fourth and Fifth Circuits have split on the issue of whether same-sex sexual harassment is actionable under Title VII. *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996) (actionable); *Garcia v. Elf Atochem North Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (not actionable). The First Circuit has suggested in dicta that it would treat same-sex harassment as actionable under Title VII. *Morgan v. Massachusetts General Hosp.*, 901 F.2d 186, 192 (1st Cir. 1990) (male employee's allegations of harassment by male supervisor were not sufficiently serious to constitute a Title VII violation). As the Fourth Circuit reasoned, Title VII prohibits discrimination based on the *employee's* sex; the employer's (or its agent's) sex is irrelevant. *Hopkins*, 77 F.3d at 751; *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60, 63 (D.P.R. 1995) (same). Accordingly, C.N. Brown is not entitled to summary judgment merely because LeClair, Adams and Henry are the same gender.

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or assisted in any investigation, proceeding or hearing under [the MHRA]." 5 M.R.S.A. § 4572(1)(A), (E).

The analysis of the plaintiffs' MHRA claims is identical to the Title VII analysis contained herein. As this court has explained, "The MHRA was intended by the Maine legislature to be the state analogue to Title VII, and the judicial construction of federal antidiscrimination law has, as a result, long been adverted to by the Law Court as persuasive authority for the interpretation of the MHRA." *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1511 (D. Me. 1991) (citing *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1261 (Me. 1979); *Greene v. Union Mut. Life Ins. Co.*, 623 F. Supp. 295, 298-99 (D. Me. 1985)).

2. *Quid Pro Quo* Sexual Harassment

Both plaintiffs assert claims for *quid pro quo* sexual harassment. A *quid pro quo* sexual-harassment claim requires proof that "(1) the plaintiff-employee is a member of a protected group; (2) the sexual advances were unwelcome; (3) the harassment was sexually motivated; (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment; and (5) *respondeat superior* liability has been established." *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990). C.N. Brown argues that Adams cannot establish the fourth element, i.e., that "[t]he acceptance or rejection of the harassment by [the] employee [is] an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment." *Id.* at 784.

Adams argues that LeClair linked Adams's new position as manager of the Turner store to his acceptance or rejection of sexual advances. However, LeClair merely asked Adams whether he felt he owed LeClair any sexual favors in return for the transfer to the Turner store, which had already occurred. LeClair did not in any way suggest or even imply that rejection of his sexual advances would result in rescission of the job at the Turner store, nor was Adams punished in any way for rejecting LeClair's suggestion. Adams argues that, as a result of his rejection of LeClair's advances, LeClair lied to the investigator about Adams, and Adams was transferred and eventually terminated. However, the summary judgment record does not support any causal connection between these events and his rejection of LeClair's sexual advances. Accordingly, C.N. Brown is entitled to summary judgment on Adams's *quid pro quo* sexual-harassment claims.[9]

[9] C.N. Brown does not argue for summary judgment on Henry's *quid pro quo* sexual-harassment claims.

3. Hostile Work Environment Sexual Harassment

Both plaintiffs assert claims for hostile work environment sexual harassment. An employee claiming hostile work environment sexual harassment must prove "(1) that the conduct in question was unwelcome, (2) that the harassment was based on his sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive work environment, and (4) that some basis exists for imputing liability to the employer." *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3839 (Jun. 10, 1996) (No. 95-1983). The fourth element requires a showing that the employer knew or should have known of the harassment and failed to take prompt remedial action. *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 403 (5th Cir. 1993); *Harris*, 765 F. Supp. at 1516; *see Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988) (claim for hostile environment sexual harassment under Title IX). C.N. Brown argues that neither plaintiff can prevail on the third or fourth elements.

a. Severe or Pervasive Conduct

To be actionable under Title VII the conduct at issue must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (alteration in original). Whether an environment is hostile or abusive requires consideration of all the circumstances, including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether

> the plaintiff actually found the environment abusive. But . . . no single factor is required.

Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993). These factors must be viewed both objectively and subjectively. *Id.* at 370.

"[A]n isolated sexual advance, without more, does not satisfy the requirement that an employee asserting a cause of action for hostile environment discrimination demonstrate an abusive workplace environment." *Chamberlin*, 915 F.2d at 783. This does not mean that a single sexual advance is insufficient to support a claim of hostile work environment. *Brown v. Hot, Sexy & Safer Prods., Inc.* 68 F.3d 525, 541 n.13 (1st Cir. 1995) (Title IX hostile-environment claim), *cert. denied*, 134 L.Ed.2d 191 (1996). Rather, if a single sexual advance, along with the surrounding circumstances, is sufficiently severe or pervasive that a reasonable person would find that it had rendered the environment hostile or abusive, then the plaintiff has stated a claim for hostile work environment. *See id.*

The summary judgment record, viewed in the light most favorable to the plaintiffs, reveals only two occasions on which LeClair harassed Henry. The first occurred shortly after February 23, 1994 when LeClair told Henry that he "had a nice ass and 'the things [he] could do with that ass.'" Henry Aff. ¶ 1. The second occurred in mid-April 1994 when LeClair told him that, unless he slept with him, he would not get a position in the manager-trainee program. *Id.* ¶ 3. These two isolated incidents do not give rise to a claim for hostile work environment. There is no evidence in the record suggesting that Henry and LeClair had frequent contact with one another during work. The first incident occurred when Henry had gone into work on his day off, and the second occurred following a company meeting. Deposition of Joseph Henry at 13, 15. The record reflects only these two

incidents during Henry's employment with C.N. Brown, from February 23, 1994 until June 7, 1994. Under these circumstances, although the alleged conduct could certainly be found offensive, no rational jury could find that the conduct was sufficiently severe or pervasive to alter the conditions of Henry's employment and create an abusive working environment.

b. Employer's Knowledge and Remedial Action

"Employers are liable for hostile environment harassment both by their supervisors and by the victim's co-workers if 'an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it.'" *Harris*, 765 F. Supp. at 1516 (emphasis in original). On the same day that Adams first complained of LeClair's alleged harassment, Doucette and Cyr met with Adams to discuss his concerns and offered him one week of paid administrative leave. Also that same day Eberly and Doucette confronted LeClair with Adams's allegation, instructed him not to have any contact with Adams until an investigation was conducted, and emphasized that he should act professionally at all times while working at C.N. Brown.

C.N. Brown then hired an independent investigator, Wright, a licensed clinical social worker, and told her only the categorical nature of Adams's allegations before she conducted her investigation. Wright interviewed Adams and LeClair on the same day and concluded that, although no definitive determination could be made about the veracity of Adams's allegations, "Adams would be more likely to distort facts and misinterpret social cues because of his preoccupation with attention seeking behaviors." Report at 8. Wright recommended that LeClair no longer be

responsible for supervising Adams.[10] *Id.* In his interview, Adams provided no witnesses to the alleged harassment and no specific details regarding the allegations. *Id.* at 3. The summary judgment record is devoid of any evidence that the investigation was biased or inadequate. *Cf. Fuller v. Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (investigation did not constitute adequate remediation where employer forewarned accused harasser, failed to take easy steps to corroborate harasser's version and failed to interview a witness favorable to plaintiff).

Adams argues that C.N. Brown knew or should have known that LeClair made false statements to the investigator. Contrary to Adams's representation, LeClair never said that he transferred Adams to the Turner store because Adams was unemployed and living out of his car. LeClair told Wright that was why he hired Adams at Lake Region, Report at 5, and C.N. Brown had no reason to know whether that was true or false. Next, LeClair's representation that there was a $2,000 cash loss at the Turner store, in contrast to losses of under $500 at seven of the nine locations that LeClair supervised, *id*. at 6, is confirmed by the deposition testimony of Bergeron-Kelley, Bergeron-Kelley Dep. at 51-52. Finally, Adams claims that LeClair told Wright that he was concerned about Adams's firing of personnel at the Turner store, when in fact Adams never fired anyone at the Turner store. However, LeClair only told Wright that he was concerned about Adams's firing of personnel; he did not refer specifically to Adams's time at the Turner store. Report at 6-7. Adams cites no evidence suggesting that he never fired anyone *before* he worked at the Turner store. Thus, even if C.N. Brown had attempted to verify LeClair's allegations, there is

[10] Doucette decided sometime prior to June 17, 1994 to transfer Adams. Doucette Dep. at 32. Contrary to Adams's suggestion, this does not demonstrate that the investigation was biased, because Wright related her findings to Doucette and Eberly in three telephone conversations on June 14, 15 and 16, 1994.

no suggestion in the record that LeClair's credibility would have suffered as a result. Based on the evidence in the summary judgment record, no reasonable jury could find that C.N. Brown knew or should have known of the alleged harassment.

C. Retaliation

Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).[11] To establish a prima facie case of retaliation, the plaintiffs must show that (1) they engaged in protected conduct under Title VII, the MHRA or the Maine Whistleblowers' Act; (2) they suffered an adverse employment action; and (3) a causal connection existed between the protected conduct and the adverse action. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996); *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 154 (Me. 1991). Adams's transfer to the Gray location, and the resulting decrease in monthly commissions and responsibility, could reasonably be considered an adverse employment action. *See Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir.

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[11] Similarly, the Maine Whistleblowers' Protection Act provides, in relevant part:

> No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because: (A) [t]he employee, acting in good faith, . . . reports orally or in writing to the employer . . . what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States . . . .

26 M.R.S.A. § 833(1)(A).

1990) (retaliation claim requires proof of an employment action "disadvantaging" plaintiff); *Nelson v. University of Maine Sys.*, 923 F. Supp. 275, 281 (D. Me. 1996) (under Title IX, adverse employment action must impair or potentially impair the plaintiff's employment in some cognizable manner); *Stephenson v. Aluminum Co. of Am.*, 915 F. Supp. 39, 53 (S.D. Ind. 1995) (transfer that denied employee opportunity to earn overtime pay and foreclosed her opportunities for advancement constituted adverse employment action for purposes of Title VII retaliation claim).

C.N. Brown argues that Adams has failed to show any evidence of a retaliatory motive. However, Doucette testified that he transferred Adams because he could find no indication of sexual harassment, based on Wright's report. A reasonable jury could infer from this testimony that Doucette's motivation was retaliation for Adams's complaint, rather than a more benign intent to separate Adams and LeClair.[12]

C.N. Brown also argues that Henry cannot show a retaliatory motive for his termination. Bergeron-Kelley testified that he told LeClair that Henry was "upset about not getting the manager trainee program and being promised it," whereupon LeClair "said to get rid of him." Bergeron-Kelley Dep. at 13. There is no evidence that Bergeron-Kelley told LeClair that Henry had complained about LeClair's alleged harassment. Although Henry allegedly complained to Adams

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[12] No reasonable jury, however, could find a retaliatory motive behind Frazier's termination of Adams. The summary judgment record shows that Frazier alone decided to terminate Adams based on his absenteeism and his refusal to sign a written warning. At that time, Frazier did not know about Adams's allegations of harassment.

As noted above, the Maine Whistleblowers' Protection Act applies, by its terms, to agents of an employer, such as LeClair. However, there is no evidence in the summary judgment record that LeClair himself took any adverse employment action against Adams in retaliation for Adams's opposition of an unlawful employment practice. Accordingly, LeClair is entitled to summary judgment on Adams's claim under the Maine Whistleblowers' Protection Act.

about LeClair's sexual harassment before Henry was terminated, there is no evidence to suggest that LeClair was aware of this complaint. There is no evidence from which a rational jury could infer that LeClair terminated Henry in retaliation for some protected activity.[13] Accordingly, C.N. Brown is entitled to summary judgment on Henry's claims for retaliatory discharge.

IV. Conclusion

For the foregoing reasons, the defendants' motion is ***GRANTED*** as to defendant LeClair on Counts I through V; ***GRANTED*** as to defendant C.N. Brown on Count I (*quid pro quo* sexual harassment and retaliation under Title VII) insofar as it alleges *quid pro quo* sexual harassment against Adams and retaliation against Henry; ***GRANTED*** as to defendant C.N. Brown on Counts II (retaliation against Adams under Title VII) and III (retaliation against Adams under the MHRA and Maine Whistleblowers' Protection Act) insofar as those claims are based on Adams's termination, rather than his transfer to the Gray location; ***GRANTED*** as to defendant C.N. Brown on Count IV (hostile work environment sexual harassment under Title VII); ***GRANTED*** as to defendant C.N. Brown on Count V (sexual harassment and retaliation under the MHRA) insofar as it alleges *quid pro quo* sexual harassment against Adams, hostile-work-environment sexual harassment against both plaintiffs, retaliation against Henry, and retaliation against Adams based on Adams's termination,

[13] Henry also argues that, "since [he] rejected LeClair's sexual advances and propositions," he opposed an unlawful employment practice. Plaintiffs' Opposition at 32. Merely refusing a sexual advance cannot constitute opposing an unlawful employment practice for purposes of a retaliatory-discharge claim. However, Henry does not cite, nor have I found, any authority for the proposition that mere refusal to submit to a supervisor's sexual advances constitutes "oppos[ing] an unlawful employment practice" within the meaning of 42 U.S.C. § 2000e-3. For these reasons, LeClair is also entitled to summary judgment on Henry's claim under the Maine Whistleblowers' Protection Act.

rather than his transfer; and otherwise ***DENIED***.[14]

Dated this 16th day of August, 1996.

David M. Cohen
United States Magistrate Judge

[14] Accordingly, the following claims remain for trial: Adams's claim for retaliation, based on his transfer from the Turner store to the Gray store, in violation of Title VII, the MHRA and the Maine Whistleblowers' Protection Act, *see* Second Amended Complaint Counts I, II, III and V; Henry's claim for *quid pro quo* sexual harassment in violation of Title VII and the MHRA, *see id.* Counts I and V; and both plaintiffs' interference-with-contractual-relations claims against LeClair, *see id.* Count VI.